United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

246

No. 71-1077

Raymond A. Richardson

Appellant

v.

United States of America

Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

BRIEF FOR APPELLANT

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I N D E X

Cases Cited

Cases Cited (con't) — Page

Statutes

Miscellaneous

STATEMENT OF ISSUES

1) Whether the appellate court may notice and correct plain error committed in a matter vital to a defendant in a criminal case, even though it has not been brought to the attention of the trial judge or the appellate court in the usual manner.

2) Whether the trial judge erred in his instructions to the jury, wherein an essential element of a crime is "specific intent", and the trial judge failed to instruct the jury that the influence of narcotics may eliminate that "specific intent" required to convict.

This case has not previously been before the Court.

STATEMENT OF THE CASE

Appellant was convicted by a jury on both counts of an indictment respectively charging him with entering a bank insured by the Federal Deposit Insurance Corporation with intent to commit robbery in violation of Title 18, Section 2113 (a) of the United States Code, and with attempted robbery in violation of the District of Columbia Code, Title 22, Section 2902.

The Government's witness, Billie H. Gaylor, testified that Appellant approached her teller's cage and made demand she give him her "5's, 10's and 20's and to put them neatly in a paper bag." (Tr. p.8)

The witness testified she had no alarm in her cage; that she left her cage and proceeded some distance to another teller's cage to have the alarm sounded; that she had to convince other bank employees to push the alarm before it was actually sounded; and that while all this transpired the Appellant remained at her window.

Testimony further adduced of Mrs. Gaylor showed that a bank officer made inquiry as to who pushed the alarm; that police officers arrived at the scene almost immediately, and Appellant continued to remain at the teller's window inquiring about certain banking procedures.

It is important to note that at no time was any money taken (Tr. p.19), nor at any time did Appellant produce a weapon or, in any wise making it appear he had a weapon.

Mrs. Gaylor testified she made no move to hand over the money when the alleged demand was made because of the appearance of the Appellant in that, "They appeared to either have been drinking or <u>they looked under dope or something</u>." (emphasis supplied) (Tr. p.21)

Officer Dennis McAteer of the Metropolitan Police Department testified that when he apprehended Appellant and placed him under arrest "*** the most striking feature I noticed about him was his very deliberate markedly deliberate talk *** he was slurring *** his eyelids were very droopy and he was nodding he kept nodding having to pull his eyes up *** and his nose was runny" there was no odor of alcohol on Appellant's breath. (Tr. p.46)

Sgt. Anthony E. Bell of the said Police Department substantiated Officer McAteer's description of Appellant's physical condition; that after he had placed him under arrest he noticed fresh needle marks on Richardson's arms. (Tr. pp.112-114)

At the conclusion of the trial the Court instructed the jury including in his instructions certain definitions.

"You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted." (Tr. p.130)

There was no instruction to the jury that specific intent to commit the crime of robbery may be eliminated if the Appellant was found to be under the influence of narcotics, nor any instruction that the jury should consider the effect of narcotics bearing on specific intent.

At the conclusion of the instructions no request was made by defendant for any instruction on the issue of specific criminal intent fairly raised by the evidence as bearing on such intent where the accused was under the influence of narcotics.

Upon the instruction as given the jury found Appellant guilty on both counts of the indictment.

STATUTES INVOLVED

1. Title 18, Section 2113 (a) United States Code

2. Title 22, Section 2902, District of Columbia Code

ARGUMENT

AN APPELLATE COURT MAY NOTICE AND CORRECT PLAIN ERROR COMMITTED IN A MATTER VITAL TO A DEFENDANT IN A CRIMINAL CASE EVEN THOUGH IT HAS NOT BEEN BROUGHT TO THE ATTENTION OF THE TRIAL JUDGE OR THE APPELLATE COURT IN THE USUAL MANNER.

Failure on the part of the trial court in a criminal case to instruct on all essential questions of law involved in the case, whether requested or not, clearly affects "substantial rights" within the meaning of rule that plain errors or defects affecting "substantial rights" may be noticed on appeal though they were not brought to the attention of the trial court. Tatum v. U.S., 88 U.S. App. D.C. 386, 190 F.2d 612 (1951) A defendant is entitled to an instruction on any issue fairly raised by the evidence whether or not consistent with the defendant's testimony or the defense trial theory. Womack v. U.S., 119 U.S. App. D.C. 40, 336 F.2d 959 (1964) The Government's evidence showed that Appellant had a prior conviction for the use of narcotics (Tr. p.101); that he had the symptoms of being under the influence of narcotics per the testimony of Officer McAteer and Sgt. Bell; and Mrs. Gaylor, a lay person, testified she thought the defendant to be under the influence of alcohol or drugs.

> "The defendant's right to have the jury pass on each element of the offense imposes a duty (emphasis added) on the judge to give proper instructions on each element, even though no request is made by trial counsel. (emphasis added) Jackson v. U.S. 121 U.S. App. D.C. 160, 348 F.2d 772 (1965)

In the case at bar it was incumbent upon the trial court to instruct the jury concerning evidence relating to narcotics and the defendant's use thereof. The appellate court may recognize this plain error and rule upon the trial courts failure to so instruct even though not requested so to do.

> THE TRIAL JUDGE ERRED IN INSTRUCTIONS TO THE JURY, WHEREIN AN ESSENTIAL ELEMENT OF A CRIME IS "SPECIFIC INTENT", AND THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT THE INFLUENCE OF NARCOTICS MAY ELIMINATE THAT "SPECIFIC INTENT" REQUIRED TO CONVICT.

An essential element of each of the charges on which Appellant was convicted is "specific intent." In Morrisette v. U.S., 342 U.S. 246, 72 S. Ct. 240 (1952) the court held "Where intent of the accused is an essential ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." In the case at bar the jury was charged,

> "You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted." (Tr. p.130)

In Jackson v. U.S., supra., the Court of Appeals held, inter alia, that robbery prosecution instructions on intent, that "When you do a thing on purpose, you do that which you intend to do," was clearly erroneous (emphasis added), since crime required specific intent.

The instruction to the jury on the question of intent was taken verbatim from Federal Jury Practice and Instructions, Vol. 1, Section 13.06, p.276. It is important to note in the annotations that the propriety of using this portion of the charge is now in severe doubt. Its use is an invitation to reversal. (emphasis added) The jury may mistakenly believe that it is permissible to infer specific intent solely from the doing of a particular act without regard to the totality of the circumstances; or that occurrence of the act shifts the burden of proof or knowledge or intent from the prosecution to the defense; or that the question is whether a reasonable man in similar circumstances would have had the requisite knowledge or intent, rather than whether the accused had it.

"Utterance of the quoted platitude serves no useful purpose since insofar as the statement has logical validity, the jury would know it anyhow; more important in a robbery case it creates a serious risk (emphasis added) that the jury might think the Government's burden of showing the required specific

intent could be met by proof of payment alone (entrance into bank alone) 'unless the contrary appears from the evidence' presumably evidence the defense would have to present."
U.S. v. Barash, 365 F.2d 395 (2d Cir., 1966)

Appellant was prejudiced in the charge by the trial court leading the jury to believe the Government met its burden and it would be up to the Appellant to prove otherwise.

In Mann v. U.S., 319 F.2d 404 (5th Cir., 1963) the Court held this instruction is tantamount to an incriminating presumption which the jury, absent opposing evidence, could use as a substitute for proof.

In finding the existence of specific criminal intent, the jury must consider all factors adduced at the trial and admitted as bearing on the issue. One such factor introduced at the trial was the influence of narcotic drugs on the Appellant at the time of the alleged commission of the acts for which he was arrested.

Where the jury hears evidence that Appellant is under the influence of some agency which affects the normal processes of the mind, the Appellant is entitled ipso jure to an instruction that such a condition serves to eliminate the essential element of specific intent. This court has held,

> "Where a specific intent is essential to the crime charged, and evidence is introduced that might create a reasonable doubt whether the defendant was sober enough to be capable of forming this intent, the jury must be instructed to acquit if they have such a doubt." Edward v. U.S., 84 App. D.C. 310, 172 F.2d 884 (1949)

The legal compulsion for instructing the jury on the matter of intoxication or drug influence and its effect on specific intent is so strong that the trial court is compelled (emphasis added) to give the instructions even in cases where the evidence merely surfaces at trial, notwithstanding the defendant has not chosen to include in his theory of defense. Womack v. U.S., supra. In the Womack case, the trial judge failed to instruct the jury that intoxication negated defendant's ability to form the requisite attempt to rob, on the ground that the defense had not persued this point during the course of the trial. This court reversed, stating "specifically *** a defendant accused of robbery is entitled to an instruction on drunkenness as bearing on intent *** if sufficient evidence on the intoxication issue has been introduced so that a reasonable man could possibly entertain a doubt there from that the accused was able to form the necessary intent."

Based on the evidence of an individual acting under the influence of narcotics who has stepped into a bank located along his normal route home, who possessed no weapon or

anything usable as a weapon, who remained at the scene of the alleged offense long after he was ostensibly accused as a robber, who had no effective mode of leaving the area upon completion of his alleged act or failure thereof, and who attempted to consult with several bank officials during the course of his alleged "holdup", the contrast of these facts with those in Heidman v. U.S., 104 App. D.C. 128, 259 F.2d 943 (1958), where the broad principals espoused in Womack v. U.S. supra., are manifest. It is with difficulty that a "reasonable man" could see the operations of those events without the obscuring effect on the Appellant's mental processes of the narcotic drugs in his system.

In the event that the foregoing acts would be construed to constitute manifestations of an impending robbery, it is contended herein that the effect of narcotic drugs on Appellant's mental processes was such to negate the criminal intent. To be guilty of the crime, a person must engage responsibly in the action. Easter v. D.C. 124 U.S. App. D.C. 33 (1966) A loss of self control through the use of alcohol or narcotics necessitates a finding of acquittal. The common law axiom is, "Actus non facit reum, nisi mens sit rea" Easter v. D.C. supra. Where there is a failure on the part of the trial judge to instruct the jury on the question of narcotic influence and its effect on the element of specific intent, there has been a violation of this rule, and the Appellant is entitled to a reversal of his conviction.

CONSLUSION

Where an essential element of a crime is "specific intent", evidence that the Appellant was under the influence of narcotic drugs at the time of the alleged offense is admissible to negate that "specific intent." Failure on the part of the trial judge to instruct the jury that the influence of narcotics may eliminate that "specific intent" required to convict, constitutes reversible error.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1077

UNITED STATES OF AMERICA, *Appellee,*

v.

RAYMOND A. RICHARDSON, *Appellant.*

Appeal from the United States District Court for the District of Columbia

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Cr. No. 404-70

United States Court of Appeals

INDEX

TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether there was plain error in the trial court's instructions regarding the manner of proving appellant's intent?

II. Whether the absence of an instruction that voluntary narcosis could negate intent amounted to plain error in the circumstances of this case?

* This case has not previously been before this Court.

United States Court of Appeals

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1077

UNITED STATES OF AMERICA, *Appellee,*

v.

RAYMOND A. RICHARDSON, *Appellant.*

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed March 11, 1970, appellant was charged with entering a bank with intent to commit robbery (18 U.S.C. § 2113 (a)) and attempted robbery (22 D.C. Code § 2902). After a trial by jury before District Judge John H. Pratt on November 12, 13 and 16, 1970, appellant was found guilty as indicted. On January 26, 1971, Judge Pratt sentenced appellant to four to twelve years' imprisonment on count one (18 U.S.C. § 2113 (a)) and one to three years on count two (22 D.C. Code § 2902), said sentences to run concurrently. This appeal followed.

At approximately 2:00 p.m. on December 22, 1969, four young men approached a teller's cage, occupied by Mrs. Billie H. Gaylor,[1] inside the National Bank of Washington

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[1] Mrs. Gaylor, the head paying and receiving teller at the bank, occupied the first of five tellers' cages, located twenty-five to thirty feet from the front door (Tr. 25, 34).

at 800 H Street, N.E. (Tr. 6-9, 22). One of the four men asked Mrs. Gaylor for a pen, which she gave to him[2] (Tr. 8, 22). Mrs. Gaylor then asked appellant, who was next in line, if she could help him; he replied, "Just a minute, I'm waiting," and pointed toward the back of the bank (Tr. 8, 23). Mrs. Gaylor continued counting money until the young man who had borrowed the pen finished writing and placed the pen on the sill of the teller's cage (Tr. 8). At that point appellant, who was standing to one side of the cage, stated in a menacing, very slow, very deliberate tone, "Now you can help me, you can give me those, fives and tens and twenties and put them neatly in a paper bag" (Tr. 8, 23). As appellant made his request, he pointed to Mrs. Gaylor's open money drawer (Tr. 8, 22).[3] Mrs. Gaylor became "frightened" and pushed a button in her cage that activated photographic equipment in the bank (Tr. 8-9).[4] She asked appellant what he had said, and he again declared, "You can give me those fives, and those tens and those twenties and put them in a paper bag, neatly, in a paper bag," as he continued to point toward the money drawer (Tr. 8-9). Mrs. Gaylor gathered up the money that was in front of her, closed her money drawer and again pushed the button that activated the bank's photographic equipment (Tr. 9, 29). Mrs. Gaylor took the money from her cage and proceeded to the third or middle teller's cage, where she activated one of two silent robbery alarms that were in the bank (Tr. 10, 24-25, 28). Shortly thereafter the second alarm, located in the fifth or end teller's cage, was activated at Mrs. Gaylor's request (Tr. 10-11, 24-25). She noticed the young men still waiting at her cage (Tr. 10).

The police arrived at the bank a short time later, and Mrs. Gaylor placed the money from her cage in the second

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[2] Mrs. Gaylor was not able to identify this man (Tr. 22).

[3] Mrs. Gaylor had "quite a good deal" of money in her cage as she had been checking bank deposits (Tr. 22).

[4] The photographic equipment, once activated, takes continuous pictures of the interior of the bank until it is deactivated (Tr. 23-24).

teller's cage and returned to her own cage (Tr. 11-12, 30).[5] Appellant meanwhile shouted in a "very nasty" voice, "Are you coming back here to show me how to make this two-dollar deposit?" (Tr. 11-12, 26, 30-31). Appellant repeated the same question several times until Mrs. Gaylor advised him to consult with one of the bank's officers (Tr. 12, 31). Appellant left Mrs. Gaylor's cage but returned in a few moments and stated, "I was told that you were to help me" (Tr. 13, 31). Mrs. Gaylor referred appellant to Mr. Keller, an officer, who engaged appellant in conversation (Tr. 13, 31-32). While appellant was talking to Mr. Keller, the police questioned Mrs. Gaylor about the alarm that they had received. In response Mrs. Gaylor pointed at appellant and Michael Chavious as they were running toward the front door of the bank. She stated, "Those are the two going out the door" (Tr. 13, 33). The police gave chase and brought appellant and Chavious back to the bank, where they were identified by Mrs. Gaylor (Tr. 13, 33). Mrs. Gaylor identified appellant at trial (Tr. 11) and also identified six pictures taken by the bank's cameras as the pictures that were taken during the attempted robbery (Tr. 14-19).

On cross-examination at trial Mrs. Gaylor testified that she did not surrender the money in her cage because she thought that she could "bluff them" and because "the appearance of the boys, they appeared to either have been drinking or they looked under dope, or something. They didn't look like a normal individual would, they appeared like they may have been drinking." (Tr. 21.)

Officer Dennis McAteer of the Special Operations Division, Metropolitan Police, testified that at about 2:00 p.m. on December 22, 1969, while in his scout car, he received a general radio dispatch for a robbery in progress at the National Bank of Washington at 800 H Street, N.E. (Tr. 35-36). Officer McAteer arrived at the bank only a matter

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[5] Two of the four young men left the window at Mrs. Gaylor's cage when the police entered the bank, but Mrs. Gaylor did not see where they went (Tr. 12). It was ascertained that the other person who remained at Mrs. Gaylor's cage with appellant was Michael Chavious, a juvenile (Tr. 39).

of seconds after receiving the call and observed Officer Albert Hopkins inside the bank talking with one of the bank's guards (Tr. 36-38). Officer McAteer also noticed appellant and another man positioned at the first teller's cage, "staring nervously at us, casting glances in our direction, and [he] did not seem to be going about routine bank business. . . . [T]hese people seemed to be worried about our presence." (Tr. 38.) Appellant approached Officer McAteer and asked him about making a $2 deposit, and Officer McAteer referred him to one of the tellers (Tr. 38). Shortly thereafter appellant and Chavious walked out the front door of the bank (Tr. 39). As Mrs. Gaylor talked with Officer Hopkins, she pointed towards the front door. Officers Hopkins and McAteer ran out of the bank in pursuit of appellant and Chavious (Tr. 39-40, 44). Officer McAteer observed both men "walking very swiftly and rapidly" on the north side of H Street (Tr. 40). The two officers apprehended the men about half a block from the bank and heard appellant exclaim, "What's this, I didn't do anything." (Tr. 45.) Appellant and Chavious were placed under arrest and returned to the bank, where they were identified by Mrs. Gaylor (Tr. 13, 33, 45).

On cross-examination Officer McAteer testified that he had an opportunity to observe appellant for over two hours and that he spoke "very deliberately," had a "little trouble speaking," was "slurring" his speech, "his eyelids were very droopy," "he kept nodding", and "his nose was runny." (Tr. 46.) Officer McAteer did not detect the odor of alcohol on appellant's breath (Tr. 40).

Officer Hopkins also responded to a radio run for a robbery in progress at the National Bank of Washington (Tr. 50-56). Appellant and Michael Chavious were standing at the first teller's cage when he arrived and paid more attention to Officer Hopkins than anyone else in the bank (Tr. 52, 57). He was informed by Mrs. Gaylor shortly after appellant and Chavious left the bank that they had attempted to rob it (Tr. 54-55). As Officers Hopkins and McAteer pursued appellant and Chavious down H Street, the two men "were not exactly running, but it was a very fast walk," and people on the street were "sort of scattering" and "moving out of the way" (Tr. 55-56).

Appellant testified in his own defense that he was in the bank with a friend by the name of "Shape"[6] for the purpose of opening a $2 savings account "for references" (Tr. 63). Appellant walked to the first teller's cage and, being "pretty spirited," smiled and said to Mrs. Gaylor, the teller, "I sure would like to have some of those 5's" (Tr. 64-67). Mrs. Gaylor ran from the cage, and appellant tried in vain to tell her that he was just "kidding" (Tr. 65, 99). After appellant approached Mrs. Gaylor for the second time, and then consulted with a bank officer and Officer McAteer concerning the procedure for a bank deposit, he left the bank because everyone was looking at him "like I had done something, so like I said I better leave" (Tr. 65-66). He further stated that he "didn't want to run or like anything like that, because I like I knew like [*sic*] I hadn't done anything, but I did want to get out of those circumstances" (Tr. 70).

On cross-examination appellant testified that on the date in question he had a cold and was sleepy and tired (Tr. 101). He further acknowledged that he had been convicted in Maryland of possession of heroin in June 1968.

On rebuttal Sergeant Anthony Bell of the Youth Division, Metropolitan Police, testified that at about 2:00 p.m. on December 22 he observed appellant come out of the bank and run up the street (Tr. 110). Sergeant Bell gave chase and took appellant into custody. He noticed that he "seemed drowsy and his nose kept bubbling and his eyes kept closing, his pupils were dilated, and he had no odor of alcohol about his person" (Tr. 112).

ARGUMENT

I. The trial court correctly instructed the jury, without objection, on the facts which might be considered in determining specific intent.

(Tr. 128-131)

Appellant asserts for the first time on appeal that the trial court erred in instructing the jury on specific intent,

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[6] Appellant testified that this was the only name by which he knew his friend (Tr. 63).

contending that the charge, "You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted" (Tr. 130), was error. Having elected not to comply with Rule 30, FED. R. CRIM. P., appellant must now establish plain error in attacking these instructions before he may win reversal. *E.g., United States* v. *Green,* 137 U.S. App. D.C. 424, 424 F.2d 912 (1970). It is well settled that in order to assign as error any part of a charge, it is essential that a distinct objection have been stated, with the grounds upon which it is based. *Villaroman* v. *United States,* 87 U.S. App. D.C. 240, 241, 184 F.2d 261, 262 (1950). This is required in order to allow the trial court to review the objection and correct any defect it may have created. *United States* v. *Green, supra.* A failure to object is also an indication that the instruction when given to the jurors "did not ring an alarm of error or prejudice to counsel" and therefore might not have been so prejudicial as the cold record might suggest. *Belton* v. *United States,* 127 U.S. App. D.C. 201, 205, 382 F.2d 150, 154 (1967). Appellant's failure to object at trial, we submit, is dispositive of his present contention on appeal. *United States* v. *Carter,* 136 U.S. App. D.C. 308, 420 F.2d 150 (1969), *cert. denied,* 397 U.S. 1017 (1970).

The instruction on specific intent given by the trial court here, which is identical to the standard "red book" jury instruction,[7] made it perfectly clear to the jury that:

> Intent ordinarily cannot be proved directly, because there is no way of fathoming or scrutinizing the operation of the human mind. But you may infer as to the defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by the defendant, and all of the facts and circumstances in evidence which indicate the state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done and knowingly omitted. (Tr. 129-130.)

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[7] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 43 (1966).

This instruction conforms verbatim to that approved by this court in *United States* v. *Moore*, 140 U.S. App. D.C. 309, 312 n.4, 435 F.2d 113, 116 n.4 (1970). The charge sufficiently covered the law on proof of intent, and the claim of plain error is without merit.

II. **The omission of an instruction, which appellant never requested, that voluntary narcosis could negate specific intent was not plain error.**

(Tr. 21, 46, 101, 112, 128-133)

Appellant also urges for the first time on appeal that he was entitled to an instruction dealing with the effect of voluntary narcosis upon his ability to form the specific intent to commit the crimes with which he was charged. He reasons that since one who is under the influence of an intoxicating liquor is entitled upon request to a special instruction concerning the effect of his intoxication,[8] a person under the influence of narcotics is also entitled to such an instruction even without a request.[9]

Although courts in some jurisdictions have held that voluntary narcosis is essentially the same as voluntary intoxication in its effect on the thought processes of an accused, *e.g.*, *State* v. *White*, 27 N.J. 158, 142 A.2d 659 (1958), that conclusion has not been reached in this circuit. *Cf. Grennett* v. *United States*, 131 U.S. App. D.C. 202, 403 F.2d 928 (1968); *Gaskins* v. *United States*, 133 U.S. App. D.C. 288, 410 F.2d 987 (1967). Nor has appellant offered any compelling reason for adoption of such a rule in this case. Even if ample justification were offered for an instruction on voluntary narcosis in the abstract, it is clear that this case is not an appropriate one in which the in-

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[8] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL LAW INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 125 (1966).

[9] Having elected not to comply with Rule 30, FED. R. CRIM. P., appellant again must make a plain error argument in attacking the court's failure to give the instruction *sua sponte*. *Compare Womack* v. *United States*, 119 U.S. App. D.C. 40, 336 F.2d 959 (1964), in which a request for an instruction on intoxication was made by the defendant but denied by the trial court.

struction should be given. A voluntary intoxication instruction is appropriate only when (1) sufficient evidence on the intoxication issue is raised and (2) specific intent is an essential element of the offense or offenses charged. Assuming *arguendo* that a voluntary narcosis instruction is ever appropriate, a question that need not be reached in this case, the same two prerequisites should be met before a defendant is entitled to such an instruction. We submit that the first requirement has not been met here.

In *Heideman* v. *United States,* 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), *cert. denied,* 359 U.S. 959 (1959), the Court held that a special intoxication instruction is necessary

> only if *sufficient evidence* on the intoxication issue has been introduced so that a reasonable man could possibly entertain a doubt therefrom that the accused was able to form the necessary intent. 104 U.S. App. D.C. at 131, 259 F.2d at 946 (emphasis added).

Officer McAteer and Sergeant Bell testified that appellant after his arrest spoke "very deliberately," his "eyelids were very droopy," he was "nodding," and his "nose was running" [10] (Tr. 46, 112-113). Mrs. Gaylor testified, "[T]he appearance of the boys, they appeared to either have been drinking or they looked under dope, or something" [11] (Tr. 21). Appellant's obvious advance preparation for the crimes, his careful surveying of Mrs. Gaylor's teller's cage, his deliberate requests of Mrs. Gaylor to place the money in a paper bag, his motions towards Mrs. Gaylor's cash drawer, his nervous attention to the police officers once they entered the bank, his prompt flight from the bank, and his statement after his apprehension that he did not do anything all show that appellant's mind was working logically, rationally and efficiently to the execution of his criminal

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[10] Officer McAteer was not asked to render an opinion as to whether or not appellant was under the influence of narcotics at the time of his arrest. The trial court sustained defense counsel's objection to a question calling for Sergeant Bell's opinion as to whether or not appellant was under the influence of drugs (Tr. 115-116).

[11] Mrs. Gaylor did not render a specific opinion as to appellant. Since there was a group of four "boys" at her teller's cage, the inference that appellant was under the influence of drugs is not supportable (Tr. 8-9, 22).

purpose. *Heideman* v. *United States, supra.* His actions were not those of a man so much under the influence of drugs as to be able to be unable to form the intent to rob. This conclusion is further buttressed by appellant's own testimony concerning his physical condition on December 22, which revealed that he "had a cold," "felt sleepy, and was tired" (Tr. 101). Accordingly, it cannot be said that appellant laid the evidentiary groundwork for a voluntary narcosis instruction.[12] *United States* v. *Marcey,* —— U.S.

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[12] There is one further point that should be mentioned, although appellant has not raised it either at trial or on appeal. That is the question of possible merger of the two offenses of which appellant was convicted. We bring the matter up here for brief discussion in light of this Court's recent decision in *United States* v. *Spears,* D.C. Cir. No. 23,043, decided February 16, 1971.

We firmly maintain that the two offenses involved here do not merge, at least not under the facts of this case. It is clear that the offense of entry into a bank with intent to commit robbery merges into the complete crime of bank robbery *if* the robbery is consummated. *Prince* v. *United States,* 352 U.S. 332 (1956); *Bryant* v. *United States,* 135 U.S. App. D.C. 138, 417 F.2d 555 (1969). Likewise, in *United States* v. *Spears, supra,* this Court held that the offense of assault with intent to rob a custodian of the United States mail (18 U.S.C. § 2114) merged with the completed offense of robbery. In *Spears* the Court looked to the legislative history of 18 U.S.C. § 2114 and concluded that Congress did not intend a person to be convicted of both assault with intent to rob and of the completed robbery. We are not aware of any authority, however, that declares a merger of the "entry" offenses under 18 U.S.C. § 2113 (a) and the offenses of *attempted* robbery.

In *Prince* v. *United States, supra,* the Court had occasion to examine the wording of the Federal Bank Robbery Act, 18 U.S.C. § 2113. The Court said that the language of the act making it an offense to enter a bank with intent to commit robbery "was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime." 352 U.S. at 328. The gravamen of the offense is not the act of entering, which satisfies the terms of the statute even if it is simply walking through an open public door during normal business hours, but rather the intent to steal. The Court went on to state that "even if the culprit should fall short of accomplishing his purpose [*i.e., robbery*], he could be imprisoned (under 18 U.S.C. § 2113) for 20 years for entering with the felonious intent." *Id.* at 329. It is abundantly clear from the language in *Prince* that Congress, in enacting 18 U.S.C. § 2113, intended to cover precisely the situation that is presented in the instant case. Accordingly, since appellant's conduct clearly violated both statutes and since neither offense could be said to be necessarily included in the other, *cf. United States* v. *Whitaker,* D.C. Cir. No. 23,185, decided May 26, 1971, we submit that his conviction on both counts of the indictment should stand, particularly because (1) he never raised this issue in the trial court and (2) he received concurrent sentences. *See Evans* v. *United States,* 98 U.S. App. D.C. 122, 232 F.2d 379 (1956).

App. D.C. ——, 440 F.2d 281 (1971); *United States* v. *Moore, supra.*

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court be affirmed.

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